



**Misoy v Jerotich & another (Environment & Land Case 40 of 2021)
[2022] KEELC 13339 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13339 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 40 OF 2021
MN MWANYALE, J
SEPTEMBER 29, 2022
FORMERLY ELDORET ELC CASE NO 208 OF 2015**

BETWEEN

JOAN MISOY PLAINTIFF

AND

MARY JEROTICH 1ST DEFENDANT

KEVIN KIMUTAI 2ND DEFENDANT

JUDGMENT

1. Two title deeds exist in the Nandi Lands Registry both in respect of Nandi/Kamobo/5662, one belonging to the Plaintiff Joan Jepkosgei Miso registered on December 29, 2014, while the other property belongs to the Defendants Mary Jerotich and Kevin Mutai registered to them on 3/4/2014.
2. As biology teachers us that no two species can exist in the same ecosystem and that one must go, this court has been called upon to determine which of the two title deeds will cease to exist the Nandi Land Registry.
3. By a Plaint dated 15th July 2015 the Plaintiff south a declaration that;
 - i. She is the sole registered owner of Nandi/Kamobo/5662, and is entitled to exclusive enjoyment of the same.
4. She further sought a permanent injunction to restrain the Defendants, their servants and agents from trespassing into the suit land Nandi/Kamobo/5662.

Plaintiff's Case:-

5. In her plaint, the Plaintiff pleaded that she was the registered owner of Nandi/Kamobo/5662 and the Defendants had trespassed into the land in 2014 and were occupying it, that she was entitled to



exclusive enjoyment of her proprietary interest on the suit land and thus the Defendants should be prevented from the trespass into the Plaintiff thus sought for the prayers outlined in paragraph 3 above.

Defendant's Case:-

6. In the joint defence and counterclaim the Defendant denied the Plaintiffs right to Nandi/Kamobo/5662 and averred that if any such title belonging to the Plaintiff existed then the same was a fraud and/or was issued erroneous. In the counterclaim the Defendants sought a declaratory order to the effect that (the suit property). They are the lawful owners of Nandi/Kamobo/5662 which belonged to their mother who gave it to them, before her demise.
7. It was their further averment that the land was initially bought in the year 2008 and an agreement for sale prepared on 30/7/2010. That they took possession of the suit property and took occupation in the year 2009, after purchase of the same in 2008.
8. It was the Defendants further avert that the property was transferred to them by the Original Owner Mr. Kipkoech Maswai upon subdivision of original plot number 3648 into 5662, and that the records at the County Land Registrar were changed 8 months after their registration without their knowledge and only then did the Plaintiff become the registered owner.
9. The suit proceeded partly before the Eldoret ELC and upon established of Kapsabet ELC the same was transferred for hearing and determination.
10. Parties took direction to type the proceedings and to proceed from where it had reached.

Plaintiff's Evidence: -

11. The Plaintiff testified as P.W.1. It was that she was the registered proprietor of the suit land having purchased the same from the original owner Mr. Kipkoech Maswai. That she had a house on the suit property, the Defendants were currently in occupation of the suit property without any colour of right.
12. She produced her copy of title as P Exhibit No. 1 as well as demand letters and P Exhibit No. 2 and 3.
13. She prayed for judgement to be entered in her favour as sought for in the plaint and dismissal of the counter claim filed by the Defendants.
14. In cross – examination, she stated that she did not have an agreement for sake between herself and the late Kipkoech Maswai. She confirmed knowing the process of acquisition of title. She stated that she built the house in 2009 to 2010, and lived in it for 2 months before moving to Eldoret. The Defendants trespassed in the suit property in 2010.
15. She stated that she was aware of an Agreement between Mr. Rotich her late husband and the late Kipkoech Maswai.
16. In re-examination, she stated that she bought the property from the late Kipkoech Maswai. That the Defendant started trespassing in 2010 but finally moved in 2014. The Defendants are not related to her late husband.
17. PW2 the Land Registrar Nandi testified, she had the Original records of Nandi/Kamobo/5662. It was her testimony that the Plaintiff was registered on 24/12/2014. She produced the green card as P Exhibit 4, and Land Control Board letter of consent as P Exhibit 5 “A” and the application thereof as P Exhibit 5 “B”. She produced a certified copy of the transfer dated 22/12/2014 transferring property from Kipsoge arap Maswai to Joan Misoi the Plaintiff as P Exhibit 6.



18. It was her further testimony that the copy of tile deed (P Exhibit 1) was in conformity with their records. That currently the property was not registered in the name of Mary Jerutich and Kevin Mutai.
19. In cross – examination; it was her testimony that she had been the Land Registrar for Nandi County for about 1 year. It was her testimony in cross – examination that the green card (P Exhibit 4) – first entry – property registered on 26/3/2014 to Kipkoech arap Maswai.
20. Entry No. 2 registered to Mary Jerutich and Kevin Mutai on 2/4/2014 by way of transfer from Kipkoech arap Maswai to the two and a tittle issued on 3/4/2014 as Entry No. 3.
21. Entry No. 4 – rectification of Registrar under Section 79 (2) of L.R.A and parcel reverted back to Mr. Kipkoech arap Maswai. There was no communication to the parties and the title to be rectified and issued to the Defendants was not cancelled and destroyed as it is the practice.
22. Entry No. 6 – transfer to Joan Misoï Plaintiff by Mr. Kipkoech arap Maswai. It was her testimony that the die process was followed in issuance of title to the Plaintiff. `
23. After the testimony of PW2 the Plaintiff case was closed.

Defendants Case: -

24. The first Defendant Mary Jerutich testified as DW1. It was her testimony that the property belongs to her jointly with her brother Kevin Kimutai. It was her testimony that the property belonged to a Mr. Johnson Onsongo who sold the same to their late Mother Margaret Chepchirchir. The said Johnson Onsongo had bought the same from Mr. Kipkoech Maswai and an agreement for sale D Exhibit 1 was produced.
25. That their late mother requested Mr. Maswai to directly transfer the property to the Defendants in 2014.
26. That she together with her brother attended the Land Control Board together with Mr. Maswai. She marked the LCB application as PMFI 2. Letter of consent was equally granted and she marked the same as PMFI 3.
27. The property was thereafter transferred to them, and the transfer marked as DMFI 4, stamp duty was paid and the stamp duty receipts were marked as DMFI 5 and 6. A title deed was issued to them and the same was produced as D Exhibit 2.
28. It was her testimony that they have stayed on the suit property from 2009. In 2017, the Plaintiff sought to levy distress and they wondered how she got her tittle. The house was built by their mother and they have stayed in the suit property from 2009.
29. She further testified that she had not been notified of any defect on her title and/or told to surrender the said title. She stated that she prays to be declared as the owner.
30. In cross – examination, she started that her mother had bought a property and there was an Agreement between their late mother and Mr. Onsongo. The Agreement related to a portion in Nandi/Kamobo/3648.
31. She stated that she did not sue the Land Registrar although the process to cancel their title was not followed.
32. In the Agreement there was indication that Mr. Kipkoech Maswai was giving Osongo’s shares and Onsongo’s share were taken up by Margaret Chepchirchir, her mother.



33. She confirmed that the transfer was blank. She did not have the building approval for the house and the plan for the house. Neither did she have the occupation permit. She did not have receipts for building materials.
34. In re-examination she stated that the Agreement was made before the subdivision. The house was built by her mother and not the Plaintiff.
35. The Land Registrar who had testified as PW2, was again called by the Defendant and gave evidence as DW2.
36. It was her evidence that she was the Lands Registrar.
37. She had a copy of the green card of Nandi/Kamobo/5662. She agreed that the title D Exhibit 2 in the names of Mary Jerotich and Kelvin Mutai was issued on 3/4/2014 but Property reverted to Kipkoech arap Maswai on 29/9/2014 upon cancellation of entry number 2 under Section 79 (2) of the [Land Registration Act](#).
38. There was a transfer to Joan Misoï from Mr. Kipkoech arap Maswai on December 24, 2014 and a title issued on 29/12/2014 to the Plaintiff. She had the letter of consent from Kipkoech arap Maswai to Joan Misoï.
39. DW3 Johnson Onsongo equally testified. It was his testimony that he knew the Defendants Mary Jerotich and Kevin Kimutai. He further stated that he knew the late Kipkoech arap Maswai who sold him a property on 21/5/2003 he bought 0.2 Ha within Nandi/Kamobo/3648. The property had not been subdivided, and he took possession and built a house and planted crops in 2003.
40. Due to the post-election violence experienced after the 2007 General Elections, he sold his home in Kapsabet to Mary Chepchirchir. That Mary Chepchirchir was the mother to Margaret Jerotich and Kevin Kimutai the Defendants herein. An agreement was prepared on 30/7/2010 between Kipkoech arap Maswai and Margaret Chirchir in respect of 0.2 Ha within Nandi/Kamobo/3648.
41. In the said Agreement dated 30/7/2010 I transferred my interests to Mary Chepchirchir and my earlier agreement between myself and Mr. Maswai was deemed cancelled.
42. Peter Rotich signed the agreement on behalf of Margaret Chirchir. He stated that he was aware that the Defendants eventually got their title.
43. It was him who constructed the house and stayed there in 2003 to 2007, he left the house to Margaret Chepchirchir and her children.
44. In cross – examination, he stated that he did not have an Agreement with Peter Rotich as a purchaser, as he did not have a title he could not take the building plans to the county.
45. The cancelled agreement was between Maswai and himself whilst the agreement dated 30/7/2010 was between Margaret Chepchirchir and Kipkoech Maswai.
46. The Agreement was for a portion in Nandi/Kamobo/3648. He did not know whether Nandi/Kamobo was subdivided to 5662.
47. His initial agreement was dated 21/3/2003 but the agreement dated 30/7/2010 refers to agreement dated 31st May 2003. He was not present during the subdivision of Nandi/Kamobo/3648.
48. In re-examination, he stated that he transferred his interests to Margaret Chepchirchir. The agreement was signed on behalf of Margaret Chirchir.



49. . DW4, the 2nd Defendant herein equally testified. It was his testimony that he together with his sister and their late mother lived in Nandi/Kamobo/5662 from 2007.
50. That before living there, Mr. Osongo lived there and he sold the property to the Defendant's mother. The Plaintiff had initially sued them in Civil Suit No. 29/2014 as tenants. He was not aware why their title deed was cancelled, yet he wasn't summoned by the Registrar and their title had not been recalled.
51. In cross – examination, he stated that he was Kevin not Kelvin. He did not have the mutations for the property. I do not have receipts for stamp duty, but he was aware that stamp duty was payable at the Bank.
52. I did not file a case against the cancellation of the title, the transfer the name is Kelvin Mutai, the transfer form was blank.
53. In re-examination he stated that the ID Number on the title is the same as his ID number Nandi/Kamobo/5662 was subdivided from 4268. He was not aware of the statement Mr. Maswai had written on behalf of the Plaintiff. His mother had died in 2014, but had taken them to Mr. Maswai before her death.
54. He became aware of the cancellation of title in Court since he had not been summoned. After the testimony of the 4 defence witness, the Defence case closed, and parties filed their submissions.

Plaintiff's Submissions:-

55. It is the Plaintiff's submissions that the Defendant's title had been cancelled prior to the issuance of the Plaintiff's title hence it is the Plaintiff further faults the Defendants for not suing the Land Registrar under Section 79 (3) (A) of *Land Registration Act*. The Plaintiff further faults the Defendants for not pursuing an alternative remedy under Section 81 to 84 of the *Land Registration Act*.
56. That the Plaintiff is not accountable for the actions of the Land Registrar, thus the title issued to the Plaintiff remains unchallenged. The Plaintiff states that the Defendants lacked capacity to sue since they did not take out letters of administration.
57. The Plaintiff submits that the Plaintiff has thus proved her case on a balance of probabilities and prayed for the judgment to be entered as prayed for in the plaint and for the counterclaim to be dismissed.
58. The Plaintiff have cited the decision in the case of *Joseph Gitari vs Muthui Chomba & 7 others* (2018) eKLR, in support of their case.

Defendants Submissions:-

59. It is the Defendants submission that the Plaintiff did not have an Agreement of sale between herself and the late Mr. Kipkoech Maswai to show how she had purchased the property.
60. The Defendant further submits that entry No. 5 on the green card showed that the Plaintiff did not pay for stamp duty hence a restriction was placed on the register.
61. The Defendants has raised the following as issues of determination: -
 - a) whether there is a sale agreement and proof of payment between the Plaintiff and the Original owner (Kipkoech Maswai).
 - b) whether Section 3 of the *Law of contract Act* provided that the contract of sale of land must be in writing.



- c) whether the Plaintiff has ever taken possession of the suit land.
 - d) what is the legal position of rectification of title pursuant to Section 79 (2) of the Land Registration Act 2012 vis a vis Section 80 of the said Act.
 - e) whether the Plaintiff and the Defendants have proven their cases on a balance of probability in respect of the claim.
 - f) Who bears the costs of the suit?
62. The Defendant submits that Section 3 (3) of the Law of Contract Act provided that no suit based on a contract of the disposition of in land can be entertained unless the contract is in writing, execution by parties and is attested.
63. In reliance of this submission the Defendant cites the case of Peter Mbiru Michuki vs Samuel Mugo Muchuki. It is the Defendants submission thus, the Plaintiff has not proved purchase of the property.
64. The Defendants submits that the Plaintiff having not taken possession of the suit property. In this regard the Defendant cites the decision in the case of Margaret Areme VS Jane Muthoni Munyare, when the Court had difficulties in finding for a Defendant who had no agreement for sale and had equally not taken possession.
65. On Section 79 (2) the Defendant submit that the Registrar powers in rectification are limited in cases of errors or mistakes or omissions not materially affecting interests of any proprietor.
66. In support of this submissions the Defendant have cited the decision in the case of Republic vs Chief Land Registrar & another Ex parte Yosabia Kerubo Manyova (2018) eKLR.
- “where the Court held that the Registrar powers of rectification are limited to rectifying errors, mistakes or omissions that do not materially affect the interest of any proprietor.”
67. The Defendant submits that under Section 26, of the L.R.A a title can be impeached in cases of fraud, misrepresentations and/or corrupt scheme.
68. On the strength of the above submissions the Defendants prays that the Plaintiff suit be dismissed.

Issues For Determination:-

69. The Plaintiff did not frame any issue for determination while the Defendant framed 5 issues as captured in paragraph 60 above.
70. From the pleadings, the evidence and the submissions the Court frames the following as issues for determination.
- i) Whether a transferor can reserve proprietary rights on a property after transfer capable of reverting the property to themselves after transfer through rectification of the register.
 - ii) What are the scope of powers of the Land Registrar exercising powers under Section 79 (2) of the Land Registration Act?
 - iii) Has the Plaintiff proved her case on a balance of probability?
 - iv) Do the Defendants have the requisite locus to take out the proceedings and the counterclaim?
 - v) Have the Defendants proved their case on a balance of probabilities?



vi) Who bears the costs of the suit?

Analysis And Determination:-

71. From the pleadings and evidence on record the Plaintiff's claim is premised on the fact that the late Kipkoech Maswai transferred the property to her. She was not able to prove the purchase of the property as she did not produce any agreement for sale, however she produced the transfer and requisite consents including a search showing that the suit property was hers.
72. Section 3 (3) of the *law of contract Act* requires that any disposition of an interest in land must be evidenced in writing, in so far as there was no agreement for sale between the late Kipkoech arap Maswai for Maswai and the Plaintiff the Court does not readily agree that there was any purchase by the Plaintiff.
73. Accordingly to the Green Card entry number 2 and 3 indicate the property to have been transferred to the Defendants. Entry number 4 is a rectification of entry number 2 and 3 with the result that the suit property reverted to the original owner Kiprotich arap Maswai, who thereafter transferred it to the Plaintiff.
74. In answer to issue number 1, the transferor in this case, was Kipkoech arap Maswai, and entry number 2 and 3 confirmed the transferee as the Defendants, could the transferor reserved any rights capable of reverting to themselves by way of rectification.
75. Section 24 of the *Land Registration Act* provides that "the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenances thereto and....."
76. It follows therefrom that upon transfer to the Defendants, the transferor Kipkoech Maswai, was no longer the registered owner and had no rights reserved unto himself as all rights were transferred to the Defendants as per Section 24 of *LRA*.
77. Thus in answer to issue number 1 the Court finds and answers that once a transferor transfers property they do not retain any rights over the property as per section 24 and 25 of the *Land Registration Act*.
78. On issue number 2 as to whether the scope of powers of Land Registrar to rectify a title, the Defendant submit that the Registrar power under Section 7 a (2) are limited to correction of errors, mistakes and omissions, but not on the proprietary interest and have cited the decision in the case of *Republic vs Chief Land Registrar Exparte Yobabia Kerubo Manyira* (2018) eKLR.
79. A reading of Section 79 the *Land Registration Act*, clearly limits the scope of the registrar powers to correction of errors, mistake and omissions and not materially affecting the interests of any proprietor. Subsection (2) which the registrar relied on provides for issuance of written Notice of 90 days to the proprietor.
80. The action by the Registrar in entry No. 4 was effectively to rectify and change proprietorship from the Defendants to the original owner. As noted above the original owner upon transfer did not have any rights on the property and hence the rectification done by the Registrar through entry No. 4 was to change the proprietorship from the Defendants contrary to Section 79 of the *Land Registration Act*.
81. No notices were equally sent to the Defendants before entry No. 4 was done. It was observed in the cases of *Mbiiri Kamau (representing ACK Kitharaini Church the Church Commissioners of Kenya vs Munyangia Njoka* 2021 eKLR, *Republic vs Registrar of titles Mombasa and 4 others, Exparte A.K. Abdulgani* 2018 eKLR, where the Courts were unanimous that the Land Registrars powers under



- Section 79 do not include the power to rectify properties and/or revoke title to the land as was the case herein. The Registrar decision and entry number 4 on the title was therefore an illegality since it was done contrary to Section 79 of the *Land Registration Act*.
82. In so far as the acquisition of the Plaintiffs title was made pursuant to entry number 4, by rectification of the register, which rectification materially affected the title that had been registered vide entry number 2 and 3 to the defendants, by cancellation and/or revocation of the same, it follows that the Plaintiffs claim on the title was based on an illegality and the Plaintiff does not hold good title.
83. As a result of the finding that the Plaintiff does not hold good title, it follows that the Plaintiff has not proven its case on the balance of probabilities, as her title was acquired as a result of an illegality and nullity on the part of the Registrar who exercised nonexistent powers of rectification and/or cancellation of a title purportedly under Section 79 (2) and reverted the suit property to Kipkoech arap Maswai from the Defendants.
84. The Plaintiffs suit thus must fail that answers issue No. 3.
85. It is the Plaintiff submission that the Defendants do not have requisite locus, having not taken out letters of administration, to claim the property on behalf of their late mother.
86. Whereas the evidence on record shows that the Defendant's mother who purchased the suit property initially, the testimony of DW1, DW2 and DW4 as well as a copy of the green card show that the property was transferred to the Defendants themselves.
87. Consequently the suit property never formed part of the Estate of the late Margaret Chepchirchir but rightly belonged to the Defendants as evidenced by entry No. 2 and 3 of the green card, there was thus no need to take out any letters of administrations as the Defendants are litigating on their own right.
88. In their evidence as summarized at paragraphs 23 – 53 of this judgment, it become apparent that the suit property was purchased by the Defendants mother from DW3, who had bought if from the original owner Kipkoech Maswai and assigned his rights to the Defendant's mother. Ultimately, the original owner Kipkoech Maswai transferred the property to the Defendants. The Court is convinced that on a balance of probabilities the Defendants have proved their case on the legitimacy of the title issued to them and have actual proven their case and are deserving of the orders sought in the counterclaim.

Disposition:-

89. Having found that the Plaintiff did not proof her claim on the required standard and that the title issued to her was issued illegally in contravention of Section 79 (2) the Court finds that the title issued to the Plaintiff is impeachable under Section 26 of the *Land Registration Act*, and accordingly directs the Land Registrar to effect a rectification under Section 80 of the *Land Registration Act*, as a Court of Law cannot sanction and illegality and if the tile is to remain, it would amount to sanctioning of an illegality.
90. The Land Registrar to rectify by cancellations of the entries 4, 5, 6 and 7 of the Registrar of Nandi/Kamobo/5662.
91. The Court finds that the title belonging to Defendants issued on 3/4/2014, to be valid and upholds the same; and prayed for in paragraph 9 of the counterclaim, and issues a permanent injunction as against the Plaintiff restraining her, her servants agents and/or acting on behalf from trespassing into encroaching onto and interfering with and alienating or dealing with Nandi/Kamobo/5662; as prayed for in paragraph 8 of Defence and counterclaim.



92. The Defendants shall have costs of the suit and the counterclaim.

93. Judgment accordingly.

DATED AT KAPSABET THIS 29TH SEPTEMBER, 2022.

HON. M. N. Mwanyale,

JUDGE

In the presence of;

Mr. Momanyi for Plaintiff

Mr. Omboto for Defendants.

